

90-1000

No.

Supreme Court, U.S.
FILED

DEC 21 1990

JOSEPH E. SPANIOLO, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOSEPH E. LANDA, II, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF MILITARY APPEALS**

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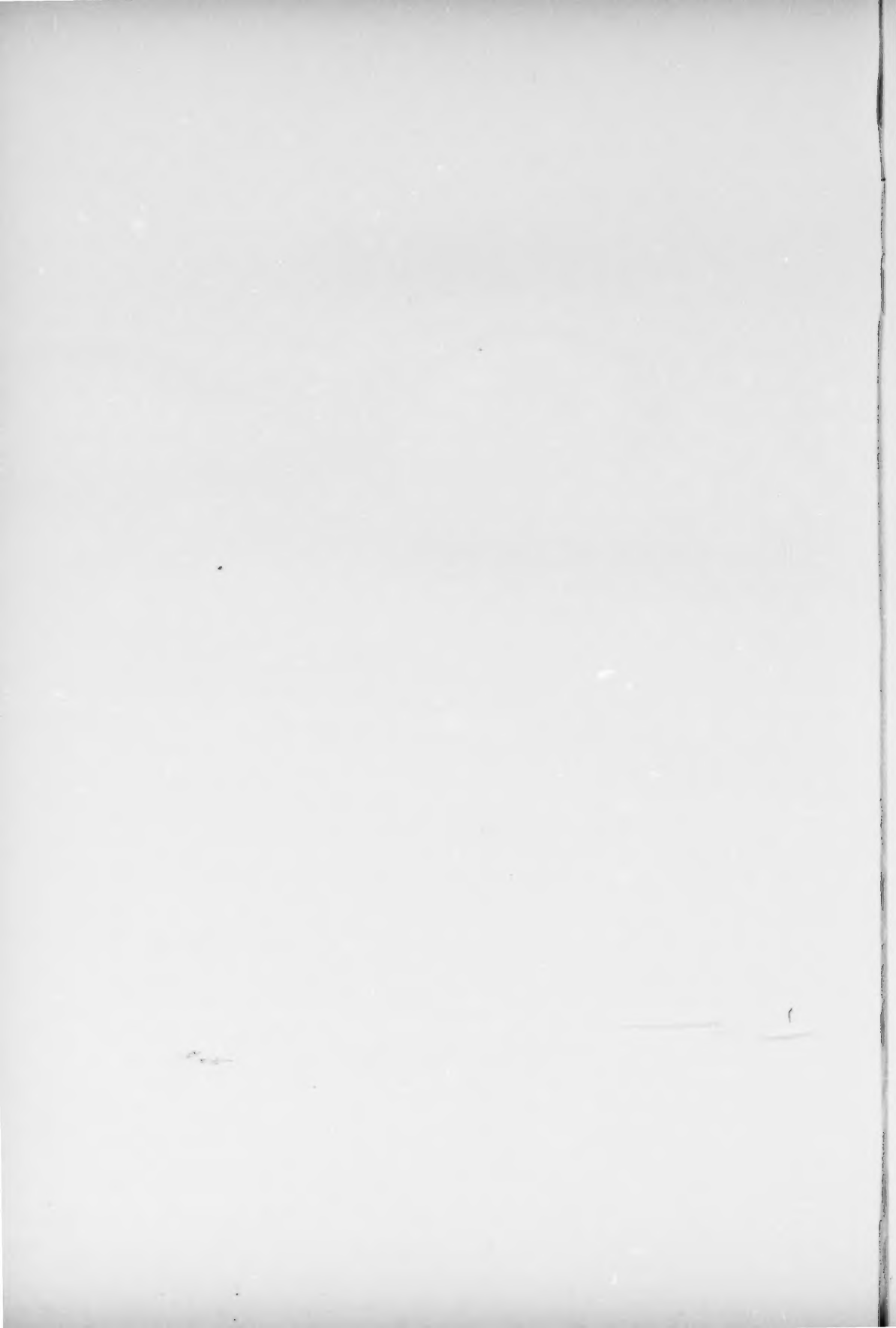
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United States Air Force

Counsel for Petitioner

DECEMBER 1990



QUESTION PRESENTED

Whether appellant's right to due process of law was violated by the manner in which the government garnered the evidence used against him at trial.

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(1)



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In the Supreme Court of the United States

OCTOBER TERM, 1990

No.

JOSEPH E. LANDA, II, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Joseph E. Landa, II, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on September 29, 1990.

OPINIONS BELOW

The United States Air Force Court of Military Review issued an unreported decision on February 2, 1990 (Appendix A). The decision of the United States Court of Military Appeals is reported at 31 M.J. ____ (C.M.A. 1990) (Appendix B.).

JURISDICTION

The final order of the United States Court of Military Appeals was entered on September 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1990) and 10 U.S.C. § 867(h) (1988).

STATEMENT OF THE CASE

In March of 1989 the petitioner, an Air Force airman first class (E-3), was tried by a general court-martial at Norton Air Force Base (AFB), California. Contrary to his pleas of not guilty, the petitioner was convicted of two offenses that involved the use and distribution of methamphetamine, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a (1988). The petitioner was sentenced to a bad conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and a reduction to airman basic (E-1). The Air Force Court of Military Review affirmed the findings and the sentence on February 2, 1990. The decision of the Air Force Court of Military Review was affirmed by the United States Court of Military Appeals on September 29, 1990.

The charges were the product of an investigation conducted by the Air Force Office of Special Investigations (AFOSI) at Norton AFB. In July of 1987, Airman (Amn) William Gibson, in the throes of a serious chemical addiction to alcohol and methamphetamine, identified himself for treatment pursuant to a military self-identification program that precludes criminal prosecution for those who voluntarily come forward seeking treatment. He was subsequently directed to the local AFOSI detachment at Norton AFB, where he was interviewed by law enforcement agents. These agents threatened Amn Gibson with prosecution for withholding information if he did not identify other military members who had used drugs. On July 26, 1987, Amn Gibson made the first of several statements implicating other Air Force members in illegal drug use. He told AFOSI that he had seen the petitioner use methamphetamines and give the drug to others.

On July 3, 1987, AFOSI agents caused a number of those so identified to be ordered to the AFOSI office at Norton AFB. All were interrogated in succession and several were induced to sign statements conforming to the information that had been extracted from Amn Gibson. Amn Eddie Corne, Airman First Class (A1C) Flint Cox, and A1C James Oliver were induced to prepare statements corroborating Amn Gibson's identification of the petitioner.

At petitioner's trial, A1C Cox testified for the prosecution, but on cross-examination revealed that AFOSI agents had engaged in a number of unprofessional, heavy-handed interrogation techniques to extract a confession from him. Most disturbing was A1C Cox's revelation that these agents had, rather than properly swearing him to his statements, told him to raise his right hand and then said "blah, blah, blah, blah." The required oath was, therefore, never administered. A1C Cox was told that, if he later refused to testify in conformity with the statements so extracted, he would be court-martialed for perjury.

In addition to the disturbing revelations exposed at trial, information was subsequently developed that trial counsel had threatened to strip prosecution witnesses of previously accrued "good time" should their testimony not implicate the petitioner in accordance with the previously extracted statements. ("Good time" is a credit against a confinee's sentence to confinement that is earned by good behavior while confined). Appellate defense counsel submitted documentation demonstrating this improper threat by the prosecutor and requested a post-trial hearing to lay these matters out on the record.* The Air Force Court of

* The military has adopted a procedure whereby post-trial hearings may be directed by the appellate court in circumstances where the record is unclear and such hearings are necessary to resolve matters

Military Review refused to direct such a hearing and affirmed the findings of guilty and the sentence. The United States Court of Military Appeals summarily affirmed the lower court's decision, without discussion.

REASONS FOR GRANTING THE WRIT

The requested Writ is undoubtedly appropriate in this case. The delineated facts demonstrate that the evidence used by the prosecution to secure the petitioner's conviction was hopelessly tainted by the heavy-handed, inappropriate tactics of the AFOSI agents that investigated the matter and the trial counsel who prosecuted the case.

"Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of English-speaking peoples even toward those charged with the most heinous offenses.'" *Rochin v. California*, 342 U.S. 165, 169 (1952), quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1944); U.S. Const., Amend V. In *Rochin v. California*, *supra*, the Court found that police misconduct in forcibly extracting a suspect's stomach contents was so shocking to the conscience that due process of law precluded permitting evidence so uncovered into evidence in a court of law. The Court went on to state that:

Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only

not readily apparent on the face of the record of trial. These hearings are known as *Dubay* hearings. *United States v. Dubay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967). This procedure is commonly utilized to assist the Courts of Military Review in the exercise of their fact-finding power under Article 66c, UCMJ, 10 U.S.C. § 866c (1988).

because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency.

Rochin v. California, supra, at 173.

In *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), this Honorable Court addressed a question similar to that in the case at bar regarding the heavy-handed tactics of overly zealous prosecutors in a grand jury setting. There, the Court concluded that the prosecutor's use of "pocket immunity" and other inappropriate measures to induce testimony at a grand jury proceeding was not sufficiently egregious to undermine the fundamental fairness of the proceeding. The Court noted, however, that such conduct may rise to the level of a violation of the due process rights of the subject of such a proceeding if the tactics used by the prosecutor or the prosecutor's agents undermined the fundamental fairness of those proceedings. *See generally, Rose v. Clark*, 278 U.S. 570, 578-79 (1986); *Moran v. Burbine*, 475 U.S. 412, 433-34 (1986) (condemning police deception and interference with the exercise of constitutional rights).

The United States Court of Military Appeals recently applied this Court's reasoning in *Bank of Nova Scotia v. United States, supra*, to military courts-martial. In *United States v. McCoy*, 31 M.J. 323 (C.M.A. 1990), the Court of Military Appeals found that unauthorized promises of immunity and the deliberate failure to properly advise witnesses of their rights under the Fifth Amendment of the United States Constitution and Article 31, UCMJ, 10 U.S.C. § 831 (1988) did not run afoul of the Due Process Clause because the fundamental fairness of the proceeding was not shown to have been compromised. *United States v. McCoy, supra*, at 328.

Generally, an individual lacks standing to assert violations of the constitutional rights of another person. *United States v. Little*, 753 F.2d 1420, 1441 (9th Cir. 1984); *United States v. Salinas-Calderon*, 728 F.2d 1298, 1302 (10th Cir. 1984); *United States v. McCoy*, *supra*. However, when such governmental misconduct so undermines the fundamental fairness of an accused's trial, it is the due process rights of the accused that have been abridged. *Bank of Nova Scotia v. United States*, *supra*; *United States v. McCoy*, *supra*. The ultimate question, therefore, is whether petitioner received a trial that was fundamentally fair. See generally, *Darden v. Wainwright*, 477 U.S. 168, 181 (1986).

The instant case presents a situation wherein the misconduct of law enforcement officials did specifically undermine the fundamental fairness of petitioner's trial. The case depended entirely on the credibility of the witnesses summoned to incriminate petitioner. The techniques utilized by the AFOSI to extract evidence incriminating petitioner demonstrate a wholesale disregard for fundamental fairness. The prosecutor's threat to disapprove the "good time" of any witness who did not incriminate petitioner at trial was abusive, not only of the rights of the witness, but of the due process rights of petitioner as well.

Further, when evidence of additional prosecutorial misconduct came to light, the Air Force Court of Military Review refused to implement the only procedure whereby petitioner could expose these abuses on the record. *United States v. Dubay*, *supra*. The Court of Review's observation that the trial defense counsel was able to attack the credibility of the witnesses against petitioner in no way justified its steadfast refusal to allow petitioner the opportunity to demonstrate the extent of the investigatory and prosecutorial misconduct attendant his conviction.

The Court of Military Appeals' summary conclusion that ". . . [petitioner] was not denied a fair trial . . ." is, therefore, patently erroneous. It was manifestly unfair to permit petitioner to be convicted on testimony that was the product of threats by investigators to arrange the prosecution for withholding information of witnesses who failed to incriminate others. It was fundamentally unfair to permit petitioner's conviction to stand on testimony that resulted from threats of perjury prosecutions for those who refused to testify in an incriminating fashion against appellant. Finally, it was blatantly unfair to permit a conviction to rest on testimony that was secured by threats to revoke accrued "good time" sentence credit.

The investigative and prosecutorial abuses in this case compel but a single conclusion—petitioner was denied a fair trial and due process of law. His petition should, therefore, be granted.

CONCLUSION

The petitioner's case is worthy of Supreme Court review. In particular, this case offers a unique opportunity to address the dimensions of the Government's obligation to investigate and prosecute criminal offenses in a manner that is congruous with fundamental notions of fair play and due process of law. Therefore, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL D. BURT

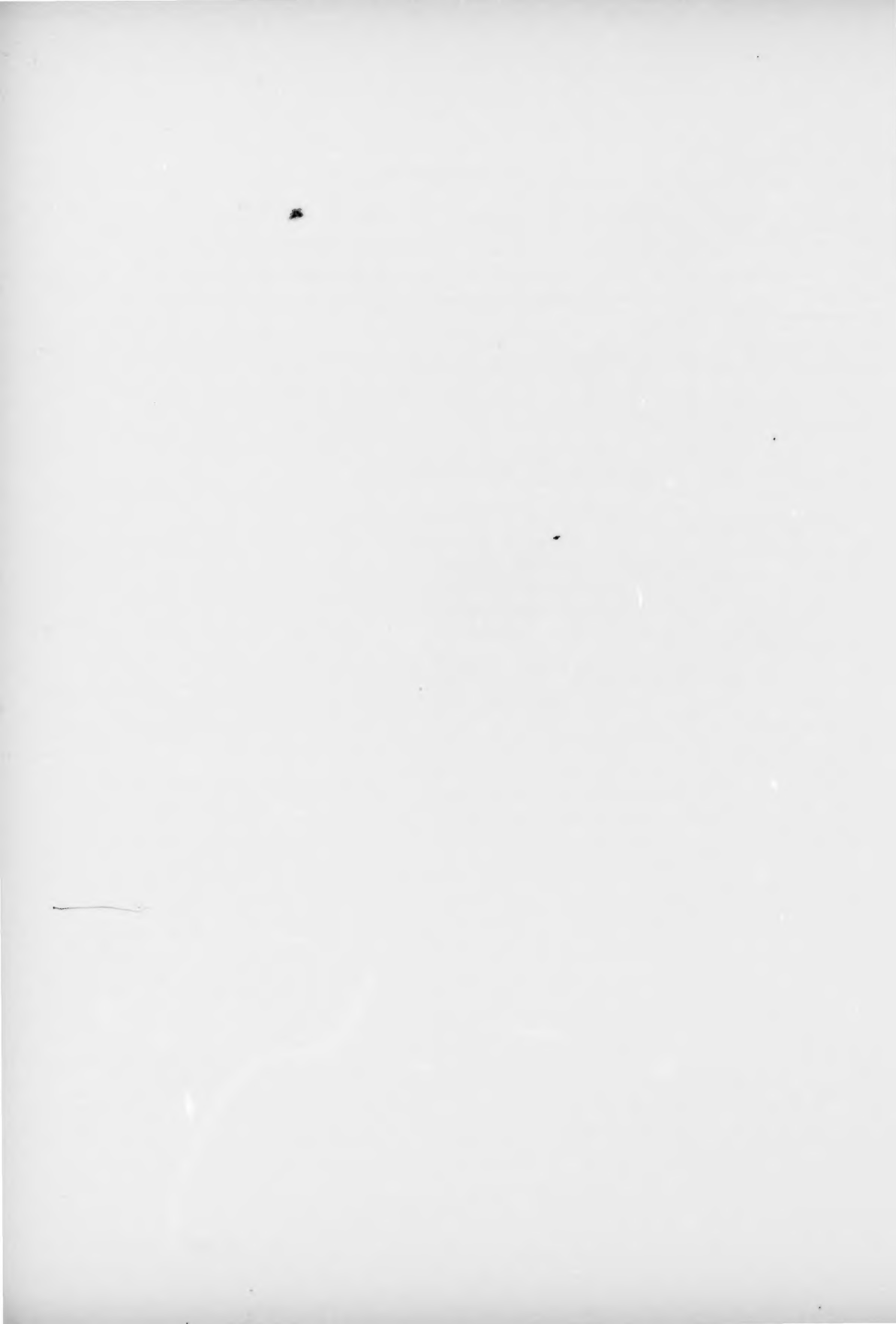
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DECEMBER 1990

APPENDIX A



UNITED STATES AIR FORCE COURT OF
MILITARY REVIEW

ACM 27740

UNITED STATES

v.

AIRMAN JOSEPH A. LANDA, II, FR 415-35-5290
UNITED STATES AIR FORCE

2 FEBRUARY 1990

Sentence adjudged 3 March 1989 by GCM convened at Norton Air Force Base, California. Military Judge: Kevin L. Daugherty (sitting alone).

Approved sentence: Bad conduct discharge, confinement for eighteen (18) months, forfeiture of all pay and allowances and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Richard F. O'Hair and Captain Darla G. Orndorff. Appellate Counsel for the United States: Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Terry M. Petrie, Captain Morris D. Davis, Captain James C. Sinwell and Captain Leonard R. Rippey.

Before

FORAY, LEONARD and MURDOCK
Appellate Military Judges

(1a)

DECISION

PER CURIAM:

Contrary to his pleas, appellant was convicted by a general court-martial of two offenses alleging the use and distribution of methamphetamines, in violation of Article 112a, UCMJ. The sentence extends to a bad conduct discharge, confinement for eighteen months, forfeiture of all pay and allowances, and reduction to airman basic.

In one of this assignments of error appellant questions:

WHETHER APPELLANT'S DUE PROCESS RIGHTS WERE VIOLATED BY THE WAY THE GOVERNMENT GARNERED ITS EVIDENCE AGAINST THE APPELLANT.

According to appellant the gravamen of this averment concerns "The way the OSI investigated these cases and the way they were tried did not meet Air Force standards." To support this averment appellant has invited our attention to the testimony of Airman Basic Flint Cox, who testified against appellant at trial, and additionally, has submitted post-trial statements of six people, none of whom testified at the trial. The remedy sought by appellant is "a *DuBay* hearing to determine whether there have been any improprieties in the investigation or trial phase of these courts-martial (*sic*)." However, appellant is silent as to what remedy should avail him should such a hearing determine the existence of investigative "improprieties".

This Court may remand a record of trial in any case currently undergoing appellate review before it to the same or different convening authority for referral to a military judge for the purpose of conducting a hearing outside the presence of the court-members. The purpose of such a hearing would be to determine a dispute concerning a matter or matters *not readily apparent* on the face of the

record of trial. *United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967).

Here, the matters sought to be settled at a *DuBay* hearing are not ones which were not apparent on the record of trial. At trial, appellant's defense counsel cross-examined Airman Cox and two other airmen testifying for the Government in an attempt to show "the way the OSI investigated these cases and the way they were tried did not meet Air Force standards." The obvious purpose of this aspect of trial defense counsel's cross-examination was to demonstrate to the trier of fact that these witnesses were biased, prejudiced, or otherwise had a motive to misrepresent because of the alleged untoward investigative techniques employed by agents of the OSI and, thus, impeach their credibility. See Mil. R. Evid. 608(c). No claim has been made by appellant at trial or in this appeal that any untoward OSI techniques were applied directly to appellant during the course of its investigation into offenses alleged to have been committed by him. In our view, there is no issue in dispute that requires the convening of a *DuBay* hearing. The matter was properly one to be determined at trial through either examination or cross-examination of witnesses or through the presentation of other forms of evidence. It was litigated at trial. There is nothing in the record of trial, nor was anything brought out during the oral argument had in the case, to convince us that the matter was incorrectly resolved at trial.

We have considered the other assignments of error submitted by appellant and the Government's responses thereto, and find them to be, likewise, without merit.

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Accordingly, the findings of guilty and the sentence are

AFFIRMED.

SEAL

OFFICIAL:

/s/ Mary V. Fillman
MARY V. FILLMAN
Captain, USAF
Chief Commissioner

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 64574/AF
CMR Dkt. No. 27740

UNITED STATES, APPELLEE

v.

JOSEPH A. LANDA, II, FR 415-35-5290, APPELLANT

On further consideration of the granted issue (Daily Journal, August 20, 1990) in light of *United States v. McCoy*, Dkt. No. 63,230, ____ MJ ____ (CMA September 28, 1990), we are satisfied that appellant was not denied a fair trial in this case. Accordingly, it is by the Court, this 29th day of September, 1990

ORDERED:

That the decision of the United States Air Force Court of Military Review is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (ORNDORFF)
Appellate Government Counsel (GIOVAGNONI)